

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ACS of Fairbanks, Inc.)	
Petition for Declaratory Ruling and Other Relief)	CC Docket No. 96-45
Pursuant to Section 254(e) of the Communications)	DA 02-1853
Act, As Amended)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)¹ hereby files its initial comments with the Federal Communications Commission (Commission or FCC) in the above-captioned proceeding.² In this proceeding, ACS of Fairbanks, Inc. (ASC-F) seeks a declaratory ruling that would require competitive eligible telecommunications carriers (CETCs) to demonstrate their loop costs in order to qualify and receive high-cost universal service support and interstate common line support (ICLS). NTCA supports ACS-F's petition for declaratory ruling. The request demonstrates that the "identical support" rule should not be applied in circumstances where a CETC's loop costs are known and documented.

NTCA further recommends that the Commission address this issue comprehensively by granting its petition for reconsideration in the MAG proceeding which requests the FCC to

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 554 rural rate-of-return regulated telecommunications providers. All of its members are full service incumbent local exchange carriers (ILECs), and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). And all of NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of ACS of Fairbanks, Inc. Petition for Declaratory Ruling and Other Relief Pursuant to Section 254(e) of the Communications Act, as Amended*, CC Docket No. 96-45, DA 02-1853, Public Notice (rel. August 2, 2002).

reconsider its rules requiring that all CETCs may obtain high-cost support and ICLS on the basis of an incumbent local exchange carrier's (ILEC's) costs.³ Lastly, NTCA urges the Commission to address the growing CETC duplicative support problem by issuing a Public Notice on its petition for expedited rulemaking.⁴

I. INTRODUCTION

On July 24, 2002, ACS-F filed a petition with the Commission requesting a declaratory ruling that would require CTECs to justify the level of support they receive by substantiating that their loop costs exceed the Commission's threshold cost standard for receiving high-cost support and ICLS. Specifically, ACS-F requests that when a CETC provides supported services using loops purchased as unbundled network elements (UNEs), it shall receive high-cost loop support only if the UNE price for the loop exceeds 115 percent of the national average loop cost, which is approximately \$23.00 per loop.⁵ ACS-F also requests that if a CETC's loop costs in an ILEC's service area are below this threshold, that the Universal Service Administrative Company (USAC) suspend all high-cost loop support and ICLS payments to the CETC for loops in the ILEC's service area.

³ See, *NTCA's Petition for Reconsideration of the Commission's Order In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, filed December 31, 2001.

⁴ See, *NTCA's Petition for Rulemaking to Define "Captured" and "New" Subscriber Lines for Purposes of Receiving Universal Service Support Pursuant to 47 C.F.R. § 54.307 et seq.*, filed July 26, 2002.

⁵ See, 47 C.F.R. §§ 36.601 *et seq.*, 36.631, 51.307 and 54.307. Generally, Section 54.307 provides that a CETC shall receive support for each line it serves in a particular ILEC service area based on the support the ILEC would receive for each such line, and that a CETC that uses loops purchased as UNEs to provide the supported services shall receive the lesser of the UNE price for the loop or the ILEC's per line payment from high-cost loop support and Long Term Support, if any.

II. THE COMMISSION SHOULD REVISE ITS RULES TO ENSURE COMPETITIVE NEUTRALITY AND THE INTEGRITY OF UNIVERSAL SERVICE SUPPORT

The principle of competitive neutrality requires that “universal support mechanisms and rules neither unfairly advantage or disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another.”⁶ This principle was predicated on the assumption that the public would benefit from fair competition between all types of telecommunications providers.⁷ The rules, however, have become the basis for unfair competition in high-cost rural service areas and a critical instrument used by CETCs for gaming universal service support dollars that have no relationship to their cost of providing service. They have also motivated companies to make business decisions based not on traditional market and cost factors, but rather exclusively on the availability of high-cost support and ICLS. The public clearly is not benefiting from the status quo created by the existing defects in the rules. The Commission therefore should grant the petition and also revise its rules to ensure competitive neutrality between ILECs and CETCs and the integrity of universal service.

As demonstrated in its petition, ACS-F’s average cost per loop is \$33.51 per month. At the same time, a CETC deciding to compete in ACS-F’s service area can purchase UNE loops from ACS-F at the state commission artificially discounted price of \$19.19 per loop per month. This price is the CETC’s monthly cost per loop. ACS-F also receives \$9.40 in federal high-cost universal service support per loop because its average cost per loop exceeds the Commission’s

6 *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, First Report and Order, ¶¶ 47-50 (rel. May 8, 1997).

7 The identical support rule was adopted under this same assumption. *See, In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, First Report and Order, ¶¶ 286-290 (rel. May 8,

cost threshold of approximately \$23.00 per month. There is no dispute that ACS-F provides service in a high cost area and that its average costs are above the nationwide average. While support is intended to achieve comparability it does not change the fact that the net average cost per loop for which ACS-F must recover from its customers is \$24.11.⁸

Under the Commission's rules, however, a CETC that purchases UNE loops to provide competitive local exchange service receives the lesser of the UNE price for the loop (in this instance, \$19.19) or the ILEC's per line federal high-cost universal service support (\$9.40), regardless of whether the CETC's cost per loop in the ILEC's service area is less than the FCC's \$23.00 per month threshold.⁹ Under this regime, a CETC that purchases UNE loops from ACS-F pays \$19.19 per loop (its cost) and receives \$9.40 in federal high-cost and ICLS support per loop, and thus needs only to recover to \$9.79 from its customer to break even.

Comparing ACS-F's net cost per loop of \$24.11 to a CETC's UNE induced net cost per loop of \$9.79, it is obvious that a CETC purchasing UNE loops at artificially discounted prices has a tremendous competitive advantage over the incumbent ASC-F. The CETC receives a \$14.32 discount in price, which translates to a reduction in its cost per loop. Notwithstanding that fact, if ACS-F's average cost per loop were \$19.19, it would not even qualify for universal service support under the Commission's present rules. This is a prime example of artificial competition resulting from a set of rules that unfairly favor CETCs.

The rules fly in the face of the Commission's principle of "competitive neutrality" and fail to promote efficient competition. Because the CETC is allowed to use UNEs purchased at

1997).

⁸ ACS-F's \$33.51 average cost per loop minus \$9.40 its per loop federal universal service support, equals a net average cost per loop of \$24.11.

discount to satisfy its obligations under 214(e)(1)(A), the public receives no benefit from efficiencies that might otherwise occur if it provided services at lower costs than the incumbent. The “identical support rule” and the duplication of support destroys any potential public benefit that might arise from providing support to an additional carrier.¹⁰

The rules instead allows inefficient CETCs to enter the marketplace and compete based on artificially discounted UNE loop prices that have no relation to actual ILEC or CETC loop costs. In addition, CETCs receive high-cost support and ICLS that have no relation to their cost to provide supported services. This defect in the rules is a public disservice and a plain violation of section 254(e).

Furthermore, the defects in the rules are not limited to the disparity in UNE loop prices and actual ILEC loop costs, as demonstrated above. Additional failings are revealed when facilities-based CETCs enter ILEC service areas. For example, the rules allow facilities-based CETCs not purchasing UNE loops to receive high-cost support and ICLS in an amount equal to the per loop support received by the ILEC for each CETC customer/loop in the ILEC’s service territory. The rules also fail to define “captured” and “new” subscriber lines. In doing so, they permit duplicative support that results in added drain on the universal service fund.¹¹ The deficiency here is that the rules fail to provide the Commission with any means to determine

9 47 C.F.R. § 54.307(a)(2).

10 The distorted result achieved by the use of UNEs in this case is attributable in part to 47 C.F.R. § 54.201(f) which ignores the intent of Section 214(e)(1)(A) of the Act and permits CETCs to treat UNEs as if they were their “own facilities.”

11 On July 26, 2002, NTCA filed a petition for expedited rulemaking with the FCC aimed at closing a loophole in the Commission’s rules that is jeopardizing universal service in high cost areas. CETCs are currently receiving support for service to customers who already receive the “federally supported” services from their ILECs. Because the rules do not clearly define what is a “captured” or “new” subscriber line, multiple CETCs are using this lack of definition to receive support for every customer they subscribe. As a result, high-cost support has grown exponentially from \$4.6 million in the first quarter of 2001 to \$76.4 million in the third quarter of 2002. *See*,

whether the support distributed to the CETC is excessive or in compliance with the use and sufficiency requirements in Section 254(e). As a result, the rules neither achieve competitive neutrality nor serve the public interest. Instead they facilitate CETC access to support regardless of whether the CETC provides loops or incur any common line costs. CETCs, particularly wireless CETCs, with no common line costs and no obligation to pass support benefits on to consumers reap an absolute windfall and gain an automatic unfair advantage over competing ILECs.¹²

The petition should be granted. Ensuring that each provider that receives high-cost support and ICLS uses it for the purposes intended is a duty that the Commission may not abdicate to unregulated CETCs.¹³ The Act expressly contemplates Federal and State mechanisms to monitor and verify that carriers receiving support are eligible to receive support and use the support properly.¹⁴ The Commission cannot simply assume or pretend that CETCs with no common line costs will use support for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Under the current rules it cannot ensure that unregulated CETCs are in compliance with Section 254(e) or 254(k). ACS-F's petition is a

NTCA's Petition for Rulemaking to Define "Captured" and "New" Subscriber Lines for Purposes of Receiving Universal Service Support Pursuant to 47 C.F.R. § 54.307 et seq., filed July 26, 2002.

12 U.S. Cellular in the state of Washington provides a prime example of the universal service support problem within the FCC's current rules. Shortly after its ETC designation in December 1997, U.S. Cellular began receiving universal support payments without apparently acquiring a single new customer. According to USAC's fourth quarter filing for 2001, U.S. Cellular served 44,192 customers and was projected to receive \$762,044 in monthly and more than \$9 million annually in high-cost universal service support. This resulted in U.S. Cellular receiving approximately \$17.24 in universal service payments per-customer every month. U.S. Cellular simply took the money because the current rules permit it. It never demonstrated its actual need for universal service support based on its costs. See, *NTCA's Petition for Reconsideration of the MAG Order*, CC Docket No. 00-256, filed December 31, 2001.

13 *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 265 F.3d 313, § III(B), (5th Cir. 2001). (An "agency abdicates its role as a rational decision-maker if it does not exercise its own judgment, and instead ceded near-total deference to private parties...").

14 *Qwest Corporation v. Federal Communications Commission*, 258 F.3d 1191, § II(a)(1), (10th Cir. 2001).

mechanism that allows the Commission to perform its duties under the statute.

There is an obvious need to act in this matter and to decide the pending NTCA petition for reconsideration on the MAG order. The lack of appropriate verification procedures to safeguard against improper distributions of high-cost support and ICLS will lead to unpredictable expansion of funding needs to maintain support for multiple carriers and services. It will also result in further regulatory arbitrage and provide an even greater unfair competitive advantage to CETCs. The preservation of universal service is critical. The Commission should therefore reconsider its rules requiring that all CETCs may obtain high-cost support and ICLS on the basis of an ILEC's costs and revise its rules to ensure competitive neutrality. In the interim, it should require CETCs, in circumstances where their loop costs are known and documented, to demonstrate that their loop costs qualify them to receive high-cost universal service support and ICLS.

III. CONCLUSION

Based on the above reasons, the Commission should grant the petition. It should also reconsider its rules requiring that all CETC's may obtain high-cost support and ICLS on the basis of an ILEC's costs and revise its rules to ensure competitive neutrality. The Commission should further address the growing CETC duplicative support problem by issuing a Public Notice on

NTCA's July 26 petition for expedited rulemaking and adopting NTCA's proposed definitions and rules.

Respectfully submitted,

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September 3, 2002

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in CC Docket No. 96-45, DA 02-1853 was served on this 3rd day of September 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy

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